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Nos. 94-12, 94-35, 94-189, and 94-219

In the Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

POARCH CREEK INDIANS

POARCH BAND OF CREEK INDIANS, CROSS-PETITIONER

v.

STATE OF ALABAMA, ET AL.

STATE OF FLORIDA, ET AL., CROSS-PETITIONERS

v.

SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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The Solicitor General, on behalf of the United States as amicus curiae, respectfully files this supplemental brief to address a threshold procedural issue that was not taken into account in our initial submission and that now leads us to suggest a different disposition of the cross-petition for a writ of certiorari filed by the Poarch Band of Creek Indians in No. 94-189.

1. These cases arise under the provision of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, that provides for a suit to be brought in federal district court arising from a State's failure to negotiate in good faith with an Indian Tribe concerning a compact to govern Class III gaming activities on the Indian country of that Tribe. See 25 U.S.C. 2710(d)(7). The Eleventh Circuit held that Congress does not have authority under the Indian Commerce Clause of the Constitution to authorize a suit by an Indian Tribe against a State, and that a Tribe cannot bring an action under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against the Governor of the State arising from the State's failure to negotiate concerning a compact. 94-12 Pet. App. 12a-24a. The Eleventh Circuit therefore ordered dismissal of the suits brought by the Seminole Tribe of Florida and the Poarch Band of Creek Indians against the State and Governor of Florida and the State and Governor of Alabama, respectively. 94-12 Pet. App. 25a. The Seminole Tribe (in its petition in No. 94-12) and the Poarch Band (in its cross-petition in No. 94-189) seek review of those holdings.

The court of appeals also expressed the view that, in the event a State raises an Eleventh Amendment defense to such a suit, the Tribe may notify the Secretary of the Interior of the State's failure to negotiate a compact, and at that point the Secretary of the Interior would have authority to promulgate regulations governing Class III

gaming on the Tribe's land. 94-12 Pet. App. 25a. The State of Florida (in its cross-petition in No. 94-219) and the State of Alabama (in its petition in No. 94-35) seek review of that portion of the court of appeals' opinion.

2. In the brief filed on December 28, 1994, we suggested that the Court grant the Tribes' petitions because the Eleventh Circuit has essentially held an Act of Congress unconstitutional, because there is a circuit conflict on the constitutional question, and because the *Ex parte Young* issue that is also raised by the Tribes is related to the issue of whether the Tribes can sue the States themselves. U.S. Br. 9-17. We further suggested, however, that the Court not grant (but instead hold) the States' petitions, because the court of appeals' discussion concerning the authority of the Secretary of the Interior if a State raises an Eleventh Amendment defense is dictum, because there is no circuit conflict on that issue, and because review would be premature in the absence of any action by the Secretary to issue such regulations. U.S. Br. 17-18.

3. In suggesting that the Court hold Alabama's petition for a writ of certiorari but grant the Poarch Band's cross-petition, we did not take into account the fact that although Alabama's petition was filed within 90 days of April 6, 1994, the date on which the court of appeals denied rehearing (see 94-12 Pet. App. 86a), the Poarch Band's cross-petition was not filed until July 29, 1994, and therefore was not timely in its own right under 28 U.S.C. 2101(c) and Rules 13.1 and 13.4 of the Rules of this Court. The Poarch Band's cross-petition was filed less than 30 days after receipt of Alabama's petition, and it therefore is timely under Rule 12.3 of the Rules of this Court. However, Rule 13.5 provides that "a cross-petition which, except for Rule 12.3, would be untimely, will not be granted unless a timely petition for a writ of

certiorari of another party to the case is granted." Accordingly, under this Court's Rules, the Poarch Band's cross-petition cannot be granted unless the Court grants Alabama's petition.

For the reasons stated above and in our initial brief (at 16-17), we continue to believe that the issue raised in Alabama's petition does not warrant plenary review by this Court, and that Alabama's petition (along with Florida's cross-petition in No. 94-219 raising the same issue) should be held and disposed of as appropriate in light of the Court's disposition of the Eleventh Amendment and *Ex parte Young* issues. If the Court chooses to hold Alabama's petition, however, the Poarch Band's cross-petition cannot, under Rule 13.5, be granted. We therefore suggest that the Court hold the Poarch Band's cross-petition in No. 94-189 as well.

The Eleventh Amendment and *Ex parte Young* issues are presented in the Seminole Tribe's certiorari petition in No. 94-12, and the Court can reach and decide those issues in that case. There accordingly is no need to grant review in the *Poarch Band* case in order to resolve those issues. If the Court should later reverse the judgment of the court of appeals in *Seminole Tribe*, it might then choose to grant the pending petition filed by Alabama and cross-petition filed by the Poarch Band, vacate the judgment of the court of appeals in the *Poarch Band* case, and remand that case to the court of appeals for further consideration in light of this Court's ruling in the *Seminole Tribe* case. If, on the other hand, the Court should later sustain the Eleventh Amendment and *Ex parte Young* rulings of the court of appeals in the *Seminole Tribe* case, the Court could then either deny the petition in No. 94-35 and the cross-petitions in Nos. 94-189 and 94-219, or otherwise dispose of the petition and

cross-petitions as appropriate in light of its decision in *Seminole Tribe*.

CONCLUSION

The petition for a writ of certiorari in No. 94-12 should be granted. The petition for a writ of certiorari in No. 94-35 and the cross-petitions for writs of certiorari in Nos. 94-189 and 94-219 should be held and disposed of as appropriate in light of the Court's decision in No. 94-12.

Respectfully submitted.

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Solicitor General

JANUARY 1995